Supreme Court, U.S.
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IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1993

RUSBEIRO MESSA
Petitioner

v.

THOMAS FOLEY, individually and in his capacity as Secretary of Department of Labor and Industry of the Commonwealth of Pennsylvania; IRVIN STANDER, individually and in his capacity as Referee of the Pennsylvania Workman's Compensation Bureau; FRANKFORD QUAKER GROCERY, CO., (Fleming Companies, Inc.); NORTHBROOK PROPERTY & CASUALTY INSURANCE COMPANY

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether there was fraudulent invocation of the automatic supersedeas of Section 413 of Pennsylvania Workmen's Compensation Act in contempt to court, or simple violation of due process right, where Petition for Termination filed for hernia injury sustained in 1985, deprived petitioner of benefits for distinct knee injury sustained in 1986, without previous acceptance of liabilities of the Act, and without previous opportunity to be heard by counsel.

Whether it was error of the district court to dismiss complaint pursuant to F.R.C.P. 12(b)(6) in action under 42 U.S.C. sections 1983, 1985 and 1986, based on the identity of the parties, disregarding events of corruption, conflict of interest, family bias, fraud, premeditated violation of known civil rights and State's waive of immunity.

Whether was error of the district court to grant motion to dismiss pursuant to F.R.C.P. 12(b)(6), where motion was filed instead of answer to complaint as Ordered by the Court, and where codefendant had already filed answer to complaint.

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RUSBEIRO MESSA **Petitioner**

v.

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Respondents

Petitioner very respectfully prays the Supreme Court of the United States for allowance of a Writ of Certiorari to review the judgment entered by the Third Circuit Court of Appeals, against petitioner and in favor of respondents.[1]

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[1]Northbrook's Parent Company is Allstate Insurance Company and Sears Roebuck. Frankford Quaker was purchased by Fleming Company in 1986.

OPINIONS BELOW

No opinion was issued by the Circuit Court of Appeals, but it was affirmed the opinion of the district court which is appendixed at 5a Judgement of the Court of Appeals is appendixed at 3a

The Order of the Court of Appeals denying Petition for Rehearing is appendixed at 1a

The Order of the District Court is appendixed at 23a

The Final Opinion of facts and conclusion of law of workmen's compensation Referee is appendixed at 25a-29a

STATEMENT OF JURISDICTION

This is a petition for a Writ of Certiorari, requesting the Supreme Court of the U.S. to review the judgment of the 3d Circuit Court of Appeals entered on January 4, 1994, affirming the District Court's Order granting respondents' motion to Dismiss Complaint pursuant to FRCP. 12 (b)(6).

A petition for rehearsing was denied by order entered on February 3, 1994.

The Juridiction of the Supreme Court is pursuant to 28 U.S.C. Section 1254 (1) and Supreme Court Rule 10.1 (c).

CONSTITUTIONAL PROVISIONS

The text of 42 U.S.C. Section 1983 is on District Court's opinion, appendix 15a , as well as the texts of Sections 1985 (2) and (3). 21a

F.R.C.P. 12(b)(6) is on page 26 of this petition.

The text of Section 413 of the PA Workmen's Compensation Act is on District Court's opinion appendix 7a

STATEMENT OF THE CASE

In March 1992, petitioner filed pro se a complaint in District Court against the instant respondents, seeking damages under 42 U.S.C. Sections 1983, 1985 and 1986 for fraudulent violation and conspiracy to violate

the Consent Decree and his Due Process and Equal Protection rights by fraudulent depriving him of property interest in workmen's compensation benefits with no opportunity to be heard. Declaratory, injunctive, punitive and compensatory relief in excess of $400,000.00 were claimed. Jurisdiction in District Court was claimed under 28 U.S.C. Sections 1343 (a) (1) (2) (3) (4) and jurisdiction under the Consent Decree conceded to the Honorable, Louis H. Pollak. (Complaint 1-3).

Northbrook Insurance Company (Hereafter as Northbrook), petitioner's workmen's compensation insurer, filed a motion to dismiss.

On May 7, 1992, Frankford Quaker (Frankford) filed an answer to complaint and in June, 1992, filed a motion to dismiss.

On June 6, 1992, after granting extension, the Court Ordered Irvin Stander (Referee Stander) and Secretary of Labor (Commonwealth defendants) to answer complaint by June 10, 1992. Instead, the

commonwealth defendants filed a motion to dismiss (Petitioner's Reply Brief on Appeal Court, p 18, 24a).

Oral argument for all parties' motions were scheduled by the court, but later canceled by the court.

In March 1993, petitioner filed a motion for summary judgment.

On April 9, 1993, the District Court, Honorable Louis H. Pollak, entered Order and Memorandum granting each Motion to dismiss.

In May 1993, petitioner filed an Appeal in Third Curcuit Court of Appeals where he filed a Brief, reply Brief and a Motion for Relief, and for Oral Argument.

On January 3, 1994, the Circuit Court entered a Judgment against petitioner with prejudice, affirming the Order and Memorandum of the District Court. (Appendix 3a)

Petitioner filed a timely Petition for Rehearing which was denied on February 3, 1994.

FACTS

On March 28, 1986, Petitioner sustained a knee injury on the job. (Hereafter as injury of 1986)

(complaint #19). Under the Due Process of the W. C. Act (hereafter the Act) respondents F. Quaker (Frankford) and Northbrook must report injury to the Department of Labor within three (3) days and Northbrook to issue a Notice of Compensation Payable or Agreement. 77 PS 994, 717.1) Petitioner was entitled to $347.00 per week and medical benefits (Appellant Brief p.17) but have received since then $336.00 per week under NCP for 1985 injury. (Appx. 77a) Northbrook and Frankford requested petitioner to sign medical authorization in order to process the new claim.

On February 3, 1987, after examination by doctors contracted by Northbrook, a petition for termination of compensation for previous hernia injury sustained in 1985 was filed, invoking Section 413 and alleging full recovery. No medical evidence was attached to petition. (Appx. 30a) The petition was assigned to Referee Perri. (Appx. 58a)

In May 1987, Referee Stander entered an Order granting supersedeas, stating that hearing had been provided and petitioner represented by counsel. Medical

evidence was presented to petitioner for the first time. Order was unappealable. On the alleged hearing, March 13, 1987, petitioner's counsel withdrew his appearance. (Affid Appx. 38a)

The termination Petition also deprived petitioner of benefits for injury of 1986. There was no previous Notice of Petitions for Termination or opportunity of hearing. (District Court opinion)

In August and December 1987, Referee Stander held first hearings especially for termination petition of injury of 1985. (Transcript supplemented appendix in Appeal Court)

In January 1988, Petitioner discovered: that injury of 1986 not reported to Department of Labor (Appx. 38a) and not secured under a Notice of Compensation; that injuries of 1985 had already been terminated by Final Receipt; that attorney for Frankford and Northbrook, Marcie Stander, was niece of Referee Stander, (Appx. 42a). A petition to remove Referee Stander was denied by the Bureau.

On January 23, 1988, Petitioner filed a claim petition for injury of 1986. As response, Frankford-Northbrook admitted not having paid compensation for knee injuries of 1986 but continuance of hernia injuries of 1985.

Fleming filed an affidavit stating that Northbrook had the duty to proceed after report of injury. (Appx. 48a)

On March 2, 1988, Petitioner had first hearing for injuries of 1986 before another Referee, Wallace Stevenson.

In June 1988, Referee Stevenson re-instated benefits for injury of 1985 and continued hearings to compensate injury of 1986.

In December 1990, the final determination of Referee Stevenson found Northbrook and Frankford in violation of the Act for not processing a Notice of Compensation and not paying medical benefits for total disabilities of injuries of 1986. (Appx. 25a-27a)

The Appeal Court vacated and reversed attorneys fees award, dismissed petition of claimant to set aside

final receipt and to correct Notice of Compensation. (Appx. 51a)

On appeal to Commonwealth Court, the Appeal Board declined to transfer the record and requested by concealed letter, to squash and dismiss appeal. (Appx. 52a)

In February 1992, the Commonwealth Court denied right of appeal because of orders of the Appeal Board as Interlocutory. (Appx. 53a)

In December 1992, the Board ordered suspension of medical benefits, but continuance of disability benefits. (Appx. 55a)

Petitioner's injuries have aggravated - having to sell his house, and make personal loans in order to pay, by his own, medical treatment. Notice of Compensation accepting liabilities has not been issued and benefits for injury of 1986 still denied and lost.

REASONS FOR ALLOWANCE WRIT OF CERTIORARI

This petition for a Writ of Certiorari may be granted pursuant to *Rule 10 of the Supreme Court* of the United States, where the decision of the Third Court of

Appeals has so far departed from the accepted and usual course of judicial proceeding and is in conflict with previous decisions of the same court, the district court below and the Supreme Court as follows:

I. 42 U.S.C. SECTION 1983 - CONTEMPT

DISMISSING THE COMPLAINT DESPITE FINDINGS THAT COMPENSATION BENEFITS HAD BEEN TERMINATED WITHOUT PRE-TERMINATION HEARING AND DESPITE REFEREE'S FINAL DETERMINATION OF VIOLATION OF THE ACT IS CONTRARY TO PROVISIONS OF THE CONSENT DECREE AND THE FEDERAL COURTS THAT THE FUNDAMENTAL REQUISITE OF DUE PROCESS OF LAW IS THE OPPORTUNITY TO BE HEARD AND TO BE HEARD BY COUNSEL.

In *Baksalary v. Smith*, 579 F. Supp. 218 (E. D. PA. 1984), *Baksalary v. Smith*, 591 F. Supp. 1279, 1294; *Allstate v. Baksalary*, 469 U.S. 1146, 105 S. Ct. 890 (985 affd. slip op. # 84-1606 (3rd Circ. Aug. 14, 1985), federal courts found the proceedings of the

automatic supersedeas of Section 413 of the Pennsylvania Workers' Compensation Act in violation of the Due Process Clause to the Fourteenth Amendment to the Constitution and the instant respondents agreed with the court under the Consent Decree to declare as unconstitutional any invocation thereafter of the automatic supersedeas, to terminate, suspend or deprive benefits without previous opportunity to be heard (form LIBC-40-*Baksalary at 1294).*

The district court in the instant case found that the respondents did not invoke the unconstitutional automatic supersedeas but the second clause of Section 413 which permits a referee, at his own discretion, to grant a request for supersedeas if proof of change of medical status is attached to the petition.

First, the record shows that no medical proof was attached to the petition, despite the petition mentioned some evidence, it was concealed from petitioner until the benefits were suspended. Failure to disclose medical evidence was held to violate due process on the grounds that the medical evidence - as a

matter of constitutional law - was part of the record which must be disclosed, and the decision must be based exclusively on matters in the record. *English v. City of Long Beach*, 35 Cal. 2d. 155(1950). *Mazza v. Cavicchia*, 105 A. 2d. 545 (NJ. 1954).

Secondly, in "*Baksalary*" at 233, the Court citing *Goldberg v. Kelly*, 3978 U.S. 254, 90 S. Ct. 1011, (1969), "the Supreme Court made it clear that the creation of a state entitlement program vests its recipients with due process protection against arbitrary termination of benefits" (Adams, 3d. Cir. Judge).

Petitioner has two reasons or arguments to believe that he was and has been deprived of his benefits by the invocation of the *automatic supersedeas of Section 413*: 1) The Termination Petition filed by Frankford on the Form LIBC-40 contains one of the requirements of the automatic supersedeas"...where the petition alleges that the employee has fully recovered from his disability..."*Baksalary" supra*, at 221. The respondents' petition for termination used the synonim: "All disability referable to the aforementioned injury has *ceased and*

terminated..."; 2) The Termination Petition filed under Section 413 for hernia injury of December 1985, *de facto automatically* deprived the petitioner of so much necessary medical and disability benefits for distinct knee injury sustained in March 1986, without previous notice, previous termination or supersedeas petition, previous medical evidence, previous opportunity to be heard and to be heard by counsel, and even more, without previous acceptance of due process of the workmen's compensation law. For injuries of 1986 there is no Notice of Compensation Payable or agreement to be terminated or suspended. Section 413 empowers a referee to terminate or suspend an agreement or Notice of Compensation. Respondents did not accept the Act to compensate petitioner but to deprive him or to breach compensation agreement.

In its opinion, footnote #2, the district court incorrectly found that "As is evident from the number of hearings held in the present matter, Frankford and Northbrook brought their petition under the second clause of Section 413." The only hearings held on

August and December 1987 by Referee Stander were held after granting supersedeas in May 1987.[1] The affidavit of petitioner's counsel clearly states that there was no hearing on March 1987, as respondents allege, since he withdrew his appearance on that date. And so found by district court in footnote #4 clearly affirming a violation or deprivation of due process:

> "From the papers, we know that a pre-termination hearing was scheduled before Referee Stander for March 13, 1987, but was postponed and apparently never rescheduled. Referee Stander nonetheless apparently granted supersedeas by mail on May 23, 1987."
>
> "The fundamental requisite of due process of law is the opportunity to be heard...adequate notice detailing the reasons for a proposed termination and an effective opportunity to defend by confronting any adverse witness and by presenting his own argument and evidence orally.... It is not enough that the recipient may present disposition in writing or second hand through his caseworker.... The right to be heard by counsel." *Goldberg v. Kelly*, supra. "The Supreme Court and The Constitution" Readings in American Constitution History, Third Edition, Stanley I. Kutler, page 160.

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[1]These hearings, as the transcripts show, were held

This finding of the district court clearly fits petitioner Messa in the *"Baksalary" plaintiff-* class to find the respondents in contempt to court:

> The plaintiff's class includes "all persons who have been or will be receiving benefits pursuant to the Pennsylvania Workmen's Compensation Act, and who have had or will have such benefits terminated, suspended, reduced or otherwise deprived without advanced notice and opportunity for a prior evidentiary hearing", Order of Judge Fogel, March 27, 1978. *Baksalary v. Smith*, 591 F. Supp. 1279 (1984).

Despite the concealment of workmen's compensation due process, concealment of the injury report and the provisions of the consent decree and the medical evidence, the court did not find the respondents in contempt to court, contrary to what was held in *Baksalary v. Smith* in RE: *Sabatine v. City of Erie*, 693 F. Supp, 242 (E.D.Pa. 1988), the district court,

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1 (...continued)
exclusively for Termination Petition of injured of December 1985. The first hearing for injuries of 1986 was held on March 2, 1988 before Referee Stevenson, when petitioner discovered he had not been paid compensation for this injury but for previous hernia injury.

Honorable Louis H. Pollak, held that the employer would not be held in contempt for alleged violation of Consent Decree... based on its good faith belief that employee was not entitled to such benefits and did not withhold or conceal evidence from employee's counsel as alleged by employee.

To support bad faith, a second referee, Wallace Stevenson, re-instated benefits for injury of 1985 and continued hearings for termination of injuries of 1986, finding by final determination in December 1990 that the petition was unreasonable, that respondents violated the Act for not paying medical benefits and for not proceeding with a Notice of compensation for injuries of 1986.

The Act does not exempt the employee from the application of common law doctrines and rules of law in a civil action once a final determination is made under the Act. *Grant v. Gaf Corp.*, 608 A. 2d. 1047, at 1059 (Pa. Super. Ct. 1992).

Petitioner was also denied right of due process and equal protection when referee and state officials

denied and dismissed petitions to correct or review fraudulent Final Receipt and the access to appeal court to review final orders of the workmen's compensation Appeal Board.

Respondents actions are within the verbatism of *42 U.S.C. Section 1983* herein appendixed and its requirements of deprivation of property interest in compensation benefits, under color of state workmen's compensation law and by deprivation and denial of due process and equal protection rights.

II. STATE OFFICIALS - PRIVATE PARTIES

DISTRICT COURT DISMISSED COMPLAINT DISREGARDING ALLEGATION OF CONSTITUTIONAL DEPRIVATION BY CORRUPTION, CONFLICT OF INTEREST AND FAMILY BIAS, FRAUD AND STATE'S WAIVE OF IMMUNITY.

The district court dismissed the complaint finding not necessary to consider the course of events that

violated the constitutionally protected rights of due process and equal protection; rather the district court considered the identity of the respondents, state officials and private parties jointly.

The court provided immunity to respondents Secretary of Labor, Thomas Foley and Referee Stander based on their individual capacity. The scope of these respondents under the Act is the administration, care, control and custody of workmen's compensation benefits. *Administrative Code of 1929, Section 2208*, as amended *71 P.S. Section 568* (Supp. 1975) and 77 *P.S. Sections 710 and 991* (Compt. #6,7).

The court considered not necessary the false statement of Referee Stander in the Supersedeas Order that a hearing was held on March 13, 1987. In footnote #4, the court found that no hearing was held prior to supersedeas Order. Also, petitioner was not represented on that date by attorney Kattleman, his attorney Larry glass withdrew his representation on that date, as stated in his affidavit, appendixed herein. In *Mc.Ardle v. Tronetti*, 961 F. 2d. 1083 (3d Cir. 1992), cited by the

district court, it was held that prison counselor and prison physician were not protected by judicial immunity for being responsible for filing petition for involuntary commitment which they knew contained lies.

It was also disregarded the potential conflict of interest where it was concealed for two years the relation of Referee Stander and his niece, Marcie Stander, counsel for Frankford and Northbrook, as reported by another referee here in appendix 42a. Referee Stander appointed himself to the case.

In *Petition of Dwyer*, 406 A.2d. 1935, also cited by district court, the Supreme Court of Pennsylvania held that quasi- judicial immunity insulate official of state agency from liabilities for acts performed in wanton, reckless and grossly negligence, where there are no allegations of corruption or bad faith in their conduct.

Supreme Court, Justice Sandra O'Connor held that state officers maybe personally liable for damages under Section 1983 based upon actions taken in their official capacities, and "...this Court's holding that Section 1983 was enacted to enforce provisions of the

Fourteenth Amendment against those who carry a badge of a State and represent it in some capacity, whether that act in accordance with their authority or misuse it". *Hafer v. Melo*, 112 S. Ct. 358, 360 (1991). "Eleventh Amendment does not erect barriers against suits impose individual and personal liability on state officers under section 1983." *Idem*. Also, *West v. Atkins*, 108 S. Ct. 2250 (1988).

Petitioner also claimed injunctive relief prohibiting the commonwealth defendants to terminate or deprive or suspend compensation under provisions of the Act for permanent injuries not secured under the due process of the Act. Judge is not immune from suit where plaintiff seeks prospective relief, rather than damages. *Hammond v. Creative Financial Planning*, 800 F. Supp. 1244 (E.D. Pa. 1992).

The District Court applied the official capacity immunity because it is the state the real party in interest. However, the court asserts in its opinion footnote #5, that Pennsylvania has waived its Eleventh Amendment immunity to civil rights actions in cases of care, custody

or control of personal property, under *42 Pa. C.S.A. Section 8522 (b) (Supp. 1992).* In *Baksalary,* supra., it was held by federal courts that workmen's compensation benefits are mutual "personal property interest" protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Petitioner claimed personal injuries as result of respondents jointly deprivation of medical and disability benefits without due process. Pennsylvania waived its immunity in *Ayala v. Phila. Board of Public Education,* Pa. 305 A. 2d. 877 (1973). "We now hold that the doctrine of governmental immunity long since devoid of any valid justification - is abolished in this Commonwealth". The commonwealth defendants ignored physicians recommended payment of medical treatment to avoid aggravation. The right to be free of state-occasioned violence and injury to one's bodily integrity is protected under the Constitution by substantive guarantees of due process. *Spell v. McDaniel,* 591 F. Supp. 1090 (1984).

FRANKFORD-NORTHBROOK. The District found that to claim under Section 1983 against Northbrook and Frankford, as private companies, petitioner has to allege a violation for which he is entitled to recovery.

The record shows that no due process was provided for the injuries sustained in 1986, to report injuries within three days, and to accept liabilities under agreement or Notice of Compensation. *77 P.S. Sections 994, 717.1, 731.* Pennsylvania Supreme Court held that a Notice of Compensation Payable... constituted an admission of employer's liability to employee for compensation for injuries on the job. ***Beissel v. Workers' Compensation Appeal Board,*** 465 A. 2d 969 (Pa. 1983). The final determination of another referee in 1990 found defendants in violation of the Act, however, no agreement have been issued and medical benefits denied or suspended by Order of the Board, herein appendixed. Petitioner still is receiving disability benefits for previous injury of 1985.

In "*Baksalary*" private parties were found as state actors based on this Court holding in *Lugar v. Edmondson Oil Company,* 102 S. Ct. 2744 (1982): Joint action with state official to accomplish pre judgment deprivation of constitutionally protected property interest will support claim against private party under 1871 civil rights statute. Also in *Chinchelo v. Fenton,* 763 F. Supp. 793 (M.D. Pa. 1991).

State action may be found in private use of state procedures with overt, significant assistance of governmental officials. *Bahr v. Nationals Association of Securities Dealers, Inc.*, 763 F. Supp. 584 (S.D. Fls. 1991). Respondents used proceedings in termination petitions, Notices of Compensation, Final Report, and other petitions, all filed with the commonwealth respondents, with the intent to breach compensation duty of agreement.

A general contractor qualified for immunity as long as it does not fail to meet its obligations to secure compensation for subcontractor employees.

Washington Metropolitan Area Transit Authority v. Johnson, 104 S. Ct. 2827 (1984).

Conspiracy is agreement to commit unlawful act; agreement can be proven by relation, conduct or circumstances of parties (Pa Super. et 1990) Com v. Glover 582 A. 2d. 1111 under the circumstances of an injury not reported or accepted under the Act, and also having invoked a prohibited statute, and the common interest of respondents for a successful cover up of violation, and the family relation between state official may be inferred by the respondents jointly conduct, to accord with the prohibition under 42 U.S.C. Sections 1985 (2) and claim relief as in 1985 (3), herein appendixed in District Court memorandum.

Under PA law, elements of common law claim for misrepresentation are: misrepresentation of fact; communication of that misrepresentation; intent by defendant that plaintiff will be induced to act in reliance on misrepresentation; justifiable reliance by plaintiff on misrepresentation and damage proximately caused by

reliance, Berda v. CBS, Inc. 800 F. Supp 1272 (W.D. Pa. 1992)

Petitioner was misrepresented by the fact of paying compensation for a previous injury as compensation for injury of 1986, as well as filing Petition for Termination for such previous injury to deprive compensation for injury of 1986; also issuing a supersedeas order making believe that opportunity to be heard had been provided. As result he was deprived of due process for injury of 1986 and had lost appropriate compensation. The Supreme Court of Pa held that where employee alleges fraudulent misrepresentation on the part of the employer which causes aggravation of a work related injury, the employee is not barred from pursuing a common law claim against the employer. *Martin v. Lancaster Battery* Company, Inc. 606 A 2d. 444 (Pa 1992).

The District Court also found that petitioner failed to state a claim under Section 1985 (2) (3) and 1986 because the complaint does not allege a "class based, invidious, discrimatory or animus. "The Court

disregarded petitioner's claim of being a member of the plaintiff class in "Baksalary" whose workmen's compensation benefits were deprived with no opportunity to be heard. (Original complaint claimed Section VII, petitioner being the only Spanish-American.)

To support claim under Section 1986, petitioner alleged that respondent commonwealth could prevent the conspiratory conduct of Frankford and Northbrook but failed.

III. COMPLAINT WAS DISMISSED CONTRARY TO PROVISION OF SAME FRCP 12(b)(6) WHEN ANSWER TO COMPLAINT HAD ALREADY BEEN FILED AND CONTEMPT TO COURT.

FRCP 12(b)(6) provides:

... a motion making any of this defenses shall be made before pleading if a further pleading is permittted...

Frankford make a defense alleging that complaint failed to state a claim upon which relief can be granted,

after it had already pled same defense in answer to complaint.

Commonwealth respondents requested extension to answer the complaint and filed a motion to dismiss instead of answer to complaint. After petitioner's objection, the court ordered Commonwealth respondents to file answer to complaint by June 10, 1992; However, a motion to dismiss was filed instead.

CONCLUSION

All allegations in the complaint and reasonable inferences that can be drawn from them, have established resultant damages and violations for which petitioner is entitled to relief under Sections 1983, 1985 (3) and 1986. Petitioner can not be left with burden of an unsecured expensive injury. The judgment of the courts below is in conflict with prior decisions as to call for an exercise of this court's power of supervision, reversing judgment and remanding for right of trial.

Respectfully submitted,

Rusbeiro Messa

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1439

RUSBEIRO MESSA,

Appellant

v.

THOMAS FOLEY, individually and in his capacity as Secretary of Department of Labor and Industry of theCommonwealth of Pennsylvania; IRVIN STANDER, individually and in his capacity as Referee of the Pennsylvania Workman's Compensation Bureau; FRANKFORD QUAKER GROCERY, CO., (Fleming Companies, Inc.);NORTHBROOK PROPERTY & CASUALTY INSURANCE COMPANY

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, Circuit Judges

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The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision

of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Feb 3, 1994

Circuit Judge

FOR THE THIRD CIRCUIT

No. 93-1439

RUSBEIRO MESSA,

Appellant

v.

THOMAS FOLEY, individually and in his capacity as Secretary of Department of Labor and Industry of the Commonwealth of Pennsylvania; IRVIN STANDER, individually and in his capacity as Referee of the Pennsylvania Workman's Compensation Bureau; FRANKFORD QUAKER GROCERY,CO.,(Fleming Companies, Inc.); NORTHBROOK PROPERTY & CASUALTY INSURANCE COMPANY

Appeal from the United States District Court for the Eastern District of Pennsylvania

(D.C. Civ. No. 92-01887)

District Judge: Honorable Louis H. Pollak

Submitted Under Third Circuit LAR 34.1(a)

December 30, 1993

Before: MANSMANN, GREENBURG AND NYGAARD, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against the appellant.

BY THE COURT,

Circuit Judge

Attest: Jan. 04, 1994

P. Douglas Sisk, Clerk

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

December 16, 1993

No. 93-1439

RUSBEIRO MESSA Appellant

v.

THOMAS FOLEY, et. al.

(E.D. of Pa. Civil No. 92-01887 (LHP)

Present: MANSMANN, GREENBURG, and NYGAARD, CIRCUIT JUDGES

Motion by Appellant Pro Se entitled "Statement of Appellant with reasons for an oral argument".

Listed for disposition December 30, 1993/dmm

_____

Deputy Clerk 597-1092

ORDER

The foregoing motion is denied.

Dated: Jan. 5, 1994

By the Court,

_____

Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSBEIRO MESSA	:	
	:	Civ. No.
v.		92-1887
THOMAS FOLEY, IRVIN STANDER	:	
FRANKFORD QUAKER GROCERY CO.	:	
and NORTHBROOK PROPERTY &	:	
CASUALTY INSURANCE CO.		
	:	

MEMORANDUM

Plaintiff, Rusbeiro Messa, has filed a *pro se* complaint seeking damages under 42 U.S.C. S1983, 1985 and 1986[1] claiming that defendants conspired to violate his Fifth and Fourteenth Amendment due process and equal protection rights by suspending

1. See infra Note 6 for the text of S1983 and Notes 8-9 for the text of S1985, and subsection (c) of part III for a discussion of the predicates of S1986 claim.

plaintiff's workmen's compensation benefits without a predetermination hearing. Defendants in this case include: Thomas Foley, Secretary of the Department of Labor and Industry of the Commonwealth of Pennsylvania; Irvin Stander, Referee of the Pennsylvania Bureau of Workmen's Compensation ("Referee Stander"); Frankford Quaker Grocery Company, Plaintiff's employer in 1985 and 1986 ("Frankford"); and Northbrook Property & Casualty Insurance Company, Frankford's workmen compensation insurer ("Northbrook"). All defendants have filed motions seeking dismissal of plaintiff's complaint pursuant to Fed. R. Civ. P. 12 (b) (6). For the reasons that follow, defendants' motions will be granted and plaintiff's complaint dismissed.

I. FACTS

In deciding a motion to dismiss pursuant to Fed. R.Civ. P. 12 (b) (6), this court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom and view them in a light most favorable to the non-moving party." *Rocks v. City of Phila.*, 868 F.2d 644, 644 (3d Cir. 1989).

With this in mind, the facts of his case -- as best as this court can discern -- are as follows:

On December 27, 1985, plaintiff suffered injuries in the course of his employment with Frankford. The injuries were diagnosed as left inguinal hernia, lower back strain and epididymitis. Plaintiff received compensation benefits for each of these injuries.

On March 28, 1986, plaintiff filed a written accident report with Frankford and an oral accident report by telephone with Northbrook claiming he had suffered another injury -- a knee injury and aggravation of the 1985 abdominal groin injuries -- while working for Frankford. Since the 1986 injuries, plaintiff has been unable to work despite several knee and hernia operations.

On February 3, 1987, after plaintiff was examined by three physicians hired by Northbrook, Northbrook and Frankford filed a petition with the Department of Labor and Industry seeking termination of plaintiff's compensation benefits (supersedeas) for his 1985 injuries. Northbrook and Frankford filed the petition pursuant to S413 of the Workmen's Compensation Act.[2]

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2. Section 413 provides:
The filing of a petition to terminate or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall operate as super-

From March 1987 through June 1988 a number of hearings were held, first before Referee Stander and later before Referee Stevenson[3], to determine the amount of benefits to which plaintiff was entitled as a result of his 1985 and 1986 injuries. Unfortunately, the statements of fact submitted by the parties are distressingly unhelpful; making it impossible for this court to understand fully the specific purpose, content, or outcome of each of the hearings.[4]

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2. (...continued)
sedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such an extent as the facts alleged in the petition would, if proved, require only when such petition alleges that the employee [sic] has returned to work at his prior or increased earnings or where the petition alleges that the employee [sic] has fully recovered and is accompanied by an affidavit of a physician on a form prescribed by the department that effect which is based upon an examination made within fifteen days of the filing of the petition. In any other case, a petition to terminate or modify a compensation agreement or other payment arrangement or award as provided in this section shall not automatically operate as a supersedeas, which may then be granted at the discretion of the referee hearing the case. A supersedeas shall serve to suspend the payment of compensation in whole or to such extent as the facts alleged in the petition would, if proved, require. The

77 Pa. Stat. Ann. S774 (1992).

Plaintiff claims that, based on this court's ruling in *Baksalary v Smith*, 579 F. Supp. 218, 232 (E. D. Pa. 1984), the supersedeas procedure provided in S413 is unconstitutional. In *Baksalary*, we found only that the *automatic* supersedeas provision in the first clause of S413 is unconditional. The case did not suggest that there was a constitutional problem with the second clause of S413 which requires a referee to make the determination regarding supersedeas. As is evident from the number of hearings held in the present matter, Frankford and Northbrook brought their petition under the second clause of S413.

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2. (...continued)
referee hearing the case shall rule on the request for a supersedeas as soon as possible ad may approve the request if proof of a change in medical status, or proof of any other fact which would serve to modify or terminate payment of compensations submitted with the petition. The referee hearing the case may consider any other fact which he deems to be relevant when making the decision on the supersedeas request and the decision shall not be appealable.

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3. Referee Stevenson is not named as a defendant.

II. COMMONWEALTH DEFENDANTS

Plaintiff's complaint alleges that defendants Referee Stander and Secretary Foley, in their individual and official capacities, violated his constitutional rights. Specifically, plaintiff claims that defendants' actions as Referee and Secretary respectively deprived him of his constitutional rights to due process and equal protection.

To decide the present motion to dismiss, though, it is unnecessary to trace the exact course of events in detail. Rather, the identity of the named defendants determines the result of the motion.

Plaintiff alleges that defendants conspired to violate his Fifth and Fourteenth Amendment due process and equal protection rights by depriving him of his full disability benefits without a fair hearing. For the reasons that followe, plaintiff has failed to state a claim as a matter of law against any of the defendants and defendants' motions to dismiss plaintiff's complaint will be granted.

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4. From the papers, we know that a pre-termination hearing was scheduled before Referee Stander for March 13, 1987, but was postponed and never rescheduled.

Referee Stander nonetheless apparently granted supersedeas by mail on May 23, 1987.

On August 26, 1987, a full hearing was scheduled before Referee Stander. The purpose of this hearing is unclear. Plaintiff suggests in his papers that both the 1985 and 1986 injuries were discussed, yet plaintiff had not yet filed a claim for his 1986 injuries with the Department of Labor and Industry.

On December 18, 1987, plaintiff had another hearing before Referee Stander. Again, the purpose of the hearing is not clear. Plaintiff states, though, that he began to argue that the Workmen's Compensation Act had been violated. Referee Stander refused to hear argument on that issue and instructed plaintiff to send his evidence by mail.

In January 1988, plaintiff filed his claim with the Department of Labor and Industry for his 1986 injuries. At some point, plaintiff must have received compensation benefits for these injuries, because on June 27, 1988 Referee Wallace Stevenson suspended plaintiff's benefits for his 1986 injuries. At the same hearing, Referee Stevenson reinstated plaintiff's benefits for his 1985 injuries. Referee Stevenson adopted the order proposed by plaintiff's counsel -- proposed allegedly without plaintiff's knowledge -- and ordered payment of the withheld compensation retroactive to January 13, 1988, the date of Referee Stander's denial of plaintiff's second motion for reconsideration. Referee Stevenson did not order payment of the compensation withheld during the period between the suspension of benefits and January 13, 1988 -- an amount totaling $12,096.00. Nonetheless, in March 1992, plaintiff received $12,390.00 from defendant for benefits owed during the suspension period.

A. Individual Capacity

Persons performing adjudicatory functions in administrative agencies have absolute immunity from damages liability for their judicial acts. *Butz v. Economou*, 438 U.S. 478, 514 (1978) federal agency hearing examiner entitled to same immunity as federal judge); *see McArdle v. Tronetti*, 961 F. 2d 1083, 1084 (3d Cir. 1992) (persons functioning as integral parts of judicial process have absolute immunity from civil liability).

[A]djudication within a[n]...administrative agency shares enough of the characteristics of the judicial process that those who participate would also be immune from suits for damages. *Butz*, 432 U.S. at 514. Referee Stander's determinations concerning plaintiff's entitlement to workman's compensation benefits were acts within his capacity as a referee, and thus were "judicial acts." Accordingly, Referee Stander has absolute immunity from liability with respect to those acts. *See also Petition of Dwyer*, 406 A. 2d 1355, 1359 (Pa. 1979) (adopting quasi judicial immunity for agency officials); *Myers v.*

Commonwealth Dept. of Labor & Indus., 458 A. 2d 235, 239 (Pa. Super. 1983) (workmen's compensation referee has immunity from liability).

Similarly, "agency officials responsible for deciding to initiate or continue administrative proceedings are entitled to absolute immunity." *Rocco v. Baron*, No. 84-4205, 1986 WL 2372, at *27-28 (E.D.Pa. Feb. 14, 1986) (Department of Public Welfare officials have absolute immunity from civil liability), *aff'd*, 806 F. 2d 254 (3d Cir. 1986), citing *Butz*, 438 U.S. at 516. Because Secretary Foley's acts in pursuing termination of plaintiff's benefit were within the scope of his duties as Secretary of the Department of Labor and Industry, he is entitled to absolute immunity with respect to these acts.

B. Official Capacity

"Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred [by the Eleventh Amendment] even

when the state official is the named defendant." *Papasan v. Allain*, 478 U.S. 265, 278 (1986). The Eleventh Amendment bars a suit against state officials in their official capacity because the state is the real party on interest inasmuch as the plaintiff seeks to recover from the state treasury. *Melo v. Hafer*, 912 F. 2d 628 (3d Cir. 1990), *aff'd*, 112 S. Ct. 358 (1991).

Because Pennsylvania has not waived its eleventh Amendment immunity to civil rights actions,[5] plaintiff's claims against Secretary Foley and Referee Stander in their official capacities are barred.

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5. Under 42 Pa. Cons.. Stat. Ann. SS8522 (b) (Supp. 1992), the Commonwealth has waived sovereign immunity in only the following nine contexts: (1) vehicle liability; (2) medical-profession liability, (3) care, custody or control of personal property, (4) Commonwealth real estate, highways and sidewalks, (5) potholes and other dangerous conditions, (6) care, custody to control of animals, (7) liquor store sales, (8) National Guard activities and (9) toxins and vaccines.

Due to Referee Stander's and Secretary Foley's absolute immunity from liability in their individual capacities and sovereign immunity in their official capacities, plaintiff will be unable to prove any set of facts in support of his claims against defendants Stander and Foley that will entitle him to relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Therefore, defendants Stander's and Foley's motion to dismiss plaintiff's claims against them will be granted.

III. FRANKFORD AND NORTHBROOK

A. Section 1983

Plaintiff has brought S1983 claims against Frankford and Northbrook, two private companies. To state a claim under S1983,[6] plaintiff must allege that (1) he was deprived of a right secured by the

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6. Section 1983 states

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

Constitution and laws of the United States and (2) the deprivation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 2254-55 (1988). Assuming for purposes of argument that defendants acted under color of state law,7 an issue remains as to whether plaintiff has alleged a violation for which he is entitled to recovery.

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6. (...continued)
of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. S1983 (1981).

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7. Defendants Northbrook and Frankford are private companies; however, private actors working with the state to deprive an individual of compensation benefits have been found to be state actors. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 932 n. 15 (1981) (plaintiff sought compensatory damages for unlawful attachment of property) (discussing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)); *Baksalary v. Smith*, 579 F. Supp 218, 227-228 (E.D.Pa 1984).

Section 1983 does not contemplate employer liability under the theory of respondent superior. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981) (county, its offender Advocate and its supervisors not liable under S1983 for actions of attorney in Offender Advocates Office). This is so with respect to both public and private employers. *See Sanders v. Sears, Roebuck, & Co.*, 1993 WL 19007, at *2 (8th Cir. 1993); *Rojas v. Alexander Department Store, Inc.*, 924 F. 2d 406, 408 (2d Cir. 1990), *cert. denied*, ___U.S.___, 112 S. Ct. 52 (1991); *Powell v. Shopco Laurel Co.*, 678 F. 2d 504, 506 (4th Cir. 1982); *Iskander v. Village of Forest Park*, 690 F. 2d 126, 128-29 (7th Cir. 1982). *See also Scheetz v. Morning Call, Inc.*, 747 F. Supp. 1515, 1520 (E.D.Pa. 1990) (no liability in S1983 suit against defendant newspaper for reporter's violation of plaintiff's privacy). Thus, defendants Frankford and Northbrook, as private corporations, may not be held vicariously liable for the constitutional torts of their employees.

An exception to this rule does exist. Defendants may be found liable for their employees' conduct of plaintiff can show that the employees acted pursuant to an official policy or custom. *Monell v. Department of Social Serv. of the City of N.Y.*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 2035-36 (1978). While *Monell* concerns municipal employers, courts have extended its holding to private employers. *See e.g. Sanders*, 1993 WL 19007, at *2; *Rosa*, 924 F. 2d at 409; *Iskander*, 690 F. 2d at 128-29. To recover under S1983, then, plaintiff must allege that Frankford and Northbrook have a policy or custom under which claimants are deprived of disability benefits without due process. It is not sufficient for plaintiff to claim simply that his benefits were terminated in violation of his constitutional rights.

Since plaintiff has not alleged that defendants have a custom or policy of doing business in a manner violative of claimants' due process rights, plaintiff's claims against defendants Frankford and

Northbrook do not entitle him to relief and will be dismissed.

B. Sections 1985 (2) and (3)

Plaintiff also claims that he is entitled to relief under the second clause of 42 U.S.C. S1985 (2)[8] and under S1985 (3)[9]. Any complaint filed under the second clause of S1985 (2) or under S1985 (3) must allege "class-based, invidious discriminatory animus." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (S1985 (3)); Brawer v. Horowitz, 535 F. 2d 830, 840 (3d Cir. 1976) (second clause of S1985 (2)). In that plaintiff does not allege a "class-based, invidious discriminatory animus," the complaint fails to state a claim under the second clause of S1985 (2) or under

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8. As mentioned above, plaintiff has alleged that defendants conspired to deprive him of his constitution rights to due process and equal protection under the law. This claim is considered one brought pursuant to the

S1985 (3). Plaintiff's S1985 not allege a "class-based, invidious discriminatory animus," the complaint fails to state a claim under the second clause of S1985 (2) or under S1985 (3). Plaintiff's S1985 claims against defendants will accordingly be dismissed.

C. Section 1986

A viable claim under 42 U.S.C. S1986 takes as its predicate the allegation of facts sufficient to support a claim under S1985. Section 1986 creates a right of action for failure to prevent a wrong proscribed by S1985. *Loehr v. Ventura County Comm. College Distr.*, 743 F. 2d 1310, 1320 (9th Cir. 1984); *Brown v. Reardon*, 770 F. 2d 896, 905 (10th Cir. 1985); *Silo v. City of Phila.*, 593 F. Supp. 402, 406 (E. D. Pa. 1984). Plaintiff has alleged no wrong actionable under S1985. Consequently, he has stated no claim under S1986.

8...(continued)
second clause of S1985 (2), which permits an injured party relief:

> if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

42 U.S.C. S1985 (2) (1981)

9. Section 1985 (3) reads in relevant part:

> [I] any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against anyone or more of the conspirators.

42 U. S. C. S1985 (3) (1981).

IV. CONCLUSION

For the above reasons, defendants' motions will be granted and plaintiff's complaint dismissed pursuant to Fed. R. Civ. P. 12(b) (6). An appropriate order follows.

April 8, 1993

Pollak, J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSBEIRO MESSA :

: Civ. No.

v. :

: 92-1887

THOMAS FOLEY, IRVIN STANDER :
FRANKFORD QUAKER GROCERY CO. :
and NORTHBROOK PROPERTY & :
CASUALTY INSURANCE CO. :

ORDER

After consideration of Defendants' motions to dismiss plaintiff's complaint pursuant Fed. R. Civ. P. 12 (b) (6) and plaintiff's response thereto, it is hereby ORDERED AND DIRECTED that:

(1) defendant Thomas Foley's, Secretary of Labor and Industry of the Commonwealth of Pennsylvania, motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12 (b) (6) is GRANTED; (2) defendant Irvin Stander's Referee of the Pennsylvania Bureau of Workmen's Compensation, motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b) (6) is GRANTED; (3) defendant Frankford Quaker Grocery Company's motion to dismiss plaintiff's complaint pursuant to Fed. R. Cic. P. 12 (b) (6) is GRANTED; and (4) defendant Northbrook Property & Casualty Insurance Company's motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12 (b) (6) is GRANTED.

Pollak, J

April 7, 1993 (Entered: 4/9/93 - Clerk of Court)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYVANIA

RUSBEIRO MESSA, CIVIL ACTION
Plaintiff
Filed Jun 3, 1992

v.

NORMAN R. HAIGH, et al. :

Defendants :

No. 92-1887

ORDER

AND NOW, this 2 day of June, 1992 it is ORDERED that the time within which defendants Norman R. Haign and Irvin Stander must respond to the complaint is extended to June 10, 1992.

BY THE COURT

_____

Louis H. Pollak, J.

ENTERED: 6-3-92 Clerk of Court

Rusbeiro Messa Vs. Frankford Quaker Grocery
SSN 172-48-1387

CONCLUSIONS OF LAW

1. Both the Claimant and Defendant are bound by the provisions of the Pennsylvania Workers Compensation Act, as amended.

2. The Defendant has failed to show that Claimant's disability, due to the work injury, terminated.

3. The Defendant has failed to show work available to the Claimant within his restrictions.

4. Claimant has shown that he suffered a work injury on March 28, 1986, to his right knee.

5. Claimant has shown the Defendant failed to issue either a Notice of Compensation Payable or Notice of Compensation Denial for the march 28, 1986 injury.

6. Pursuant to Section 306(f) of the Act, Defendant shall pay Claimant's outstanding medical expenses totaling $6,660.88.

7. Pursuant to Section 440 of the Act, the Claimant shall pay Claimant's costs totaling $2,447.34.

8. Pursuant to Section 442 of the Act, the Claimant's 20% fee agreement is hereby approved as reasonable.

9. Defendant has presented an unreasonable contest of this petition.

10. Claimant has shown that Defendant is in violation of Section 306 (f) of the Act in not paying medical expenses.

PROPOSED ORDER

AND NOW, on this day of November, 1990, the instant Termination/Modification Petition is **DENIED** and **DISMISSED.** Claimant's Review Petition and SAFR Petitions are denied and dismissed as moot. Claimant's Claim Petition, July 12, 1989 Penalty Petition and December 18, 1989 Penalty Petition is granted. Therefore, Defendant is **ORDERED** and **DIRECTED** to pay total disability benefits to Claimant as of march 28, 1985, for the injury; however, those benefits are suspended while Defendant pays on the December 27, 1985 injury.

Further, the Defendant is Ordered and Directed to pay Claimant's medical expenses of $6,660.88, coupled with a 20% penalty.

Further, the Defendant is Ordered and Directed to pay Claimant's litigation costs of $2,447.34.

Further, the Defendant is Ordered and Directed to pay a 20% penalty for failure to issue a Notice of Compensation payable, or a Notice of

Compensation Denial on the March 27, 1986 work injury.

Further, the Defendant is Ordered and Directed to pay James J. Muller, Esquire, 20% of the Award as a counsel fee, said fee chargeable solely to Defendant.

Wallace J. Stevenson, Referee

Philadelphia District

12-19-90

Rusbeiro Messa vs. Frankford Quaker Company SSN 172-48-1387

FINDINGS OF FACT

CLAIM PETITION OF JANUARY 25, 1988

1. In Claimant's Petition of January 25, 1988, he alleges that he injured his right knee while working for the Defendant on March 28, 1986.

2. Based on the credible deposition testimony of Harry A.Cooper, D.O., Claimant suffers a right knee injury in the nature of plica synoviais of the right suprapateller

pouch, degenerative joint disease, and shredding of the right lateral meniscus caused by his work-injury of March 28, 1986.

3. This right knee injury was separate and distinct from Claimant's groin injury which he suffered while working for the Defendant on December 27, 1985.

4. There is no evidence to show that Claimant injured his right knee on December 27, 1985.

5. Claimant's injury to his right knee while working on March 28, 1986 was a new injury and not a recurrence of his December 27, 1985 work injury.

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Workers' Compensation
3607 Derry Street
Harrisburg, PA 17111

Petition for Termination, Suspension or Modification of Compensation Section 413

(Type or Print Clearly)

RUSEIRO MESSA — Employee
172-48-1387 — Employee's SS#

7052 Rutland Street — Address
12/27/85 — Date of original injury

Philadelphia, Pa 19149
City or Town State

VS.

Frankford Quaker Grocery Co. — Employer
Northbrook Insurance — Insurance Carrier

"I" and Erie Avenue — Address
P.O. Box 548

Philadelphia, Pa 19124
City or Town State

King of Prussia, PA 19406
City or Town State

TO YOUR HONORABLE REFEREE:

Frankford Quaker Grocery Co., employer in the above case, hereby petitions that compensation payable thereunder be **x terminated, x suspended, or x modified as of** November 11, 1986, **on the**

grounds that the (disability) of Rusbeiro Messa **entitled to compensation under**

x Notice of Compensation Payable

All disability referable to the aforementioned injury has ceased and terminated. In the alternative, the Claimant's disability has subsided to a point whereby he is capable of gainful employment within his restrictions and within the appropriate geographical area. Accordingly, the Claimant is entitled to a termination, suspension or modification depending on the evidence.

x A supersedeas is (requested) for the following reasons: See the foregoing allegations.

Frankford Quaker Grocery Co.

employee or insurer

by_____

Kenneth F. DeMarco, Esquire

SUBSCRIBED AND SWORN TO BEFORE ME, THIS 3rd DAY OF February, 1987. AT Philadelphia,PA

My commission expires on the_____day of_____, 19_____

PLEASE ENTER MY APPEARANCE FOR

PETITIONER:

Kenneth F. DeMarco, Esquire
Attorney

1800 JFK Blvd., Phila. PA 19103

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
Harrisburg, Pennsylvania 17111
INTERLOCUTORY

REFEREE'S DECISION

Rusbeiro Messa
Claimant

SS# 172-48-1387

7042 Rutland Street
Street Address

Philadelphia, PA 19149
City

Request for Supersedeas as of November 11, 1986 in connection with Defendant's Petition for Termination.

vs.

Frankford Quaker Grocery Co.
Defendant

"I" & Erie Ave., Phila. PA 19124
Address

DEFENDANT'S INSURANCE CARRIER:

Northbrook Insurance Co.

P.O. Box 548

King of Prussia, PA 19406

BEFORE IRVIN STANDER REFEREE,

PHILADELPHIA DISTRICT

HEARINGS: March 13, 1987 at the State Office

Building, Phila. PA 19130

APPEARANCES:

COUNSEL FOR COMPLAINT

Louis Kattlleman, Esquire

2 Penn Center Plaza

Phila., Pa 19102

COUNSEL FOR DFENDANT

1800 JFK Blvd., 19th fl

J. Davy Yockey, Esquire

Phila., PA 19103

REFEREE'S INTERLOCUTORY ORDER

SUPERSEDEAS IS GRANTED as of May 5, 1987.

IMPORTANT NOTICE: This order does not constitute a Final Disposition of the Defendant's Petition for Termination; but is only a determination of the request for Supersedeas. The parties will be notified of a further hearing to be held before the Referee on the merits of Defendant's Petition for Termination. THIS INTERLOCUTORY ORDER IS NOT SUBJECT TO APPEAL.

_____

IRVIN STANDER, REFEREE

DATE: 5-7-87

PHILADELPHIA DISTRICT

ls

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
Harrisburg, Pennsylvania 17111
INTERLOCUTORY

REFEREE'S DECISION

Rusbeiro Messa — SS# 172-48-1387
Claimant

7042 Rutland Street
Street Address

Philadelphia, PA 19149
City

Request for Supersedeas as of November 11, 1986 in connection with Petition for Termination.

vs.

Frankford Quaker Grocery Co.
Defendant

"I" & Erie Avenue
Address

Philadelphia, PA 19124
City

DEFENDANT'S INSURANCE CARRIER:

Northbrook Insurance Company

P.O. Box 548

King of Prussia, PA 19406

BEFORE: Referee Wallace J Stevenson, Phila. District

HEARING(S) WERE SCHEDULED AS FOLLOWS:

May 23, 1988 at the State Office Building, Philadelphia, PA 19130 COURT REPORTER: Mildred Hayes

APPEARANCES:

FOR CLAIMANT	FOR DEFENDANT
James J. Muller, Esquire	Michael Schaff, Esquire
2401 Penna. Ave,Ste 1C-44	1800 JFK Blvd., 19th Fl
Philadelphia, PA 19130	Philadelphia, PA 19103

REFEREE'S INTERLOCUTORY ORDER

Upon Reconsideration Supersedeas is Denied as January 13, 1988.

A 20% counsel fee is awarded to Claimant's counsel and is to be deducted from Claimant's share of the Award.

IMPORTANT NOTICE: This order does not constitute a Final Disposition of the Defendant's Petition for Termination; but is only a determination of the request for Supersedeas. The parties will be notified of a further hearing to be held before the Referee on the merits of

Defendant's Petition for Termination. THIS INTERLOCUTORY ORDER IS NOT SUBJECT TO APPEAL.

Wallace J. Stevenson, Referee

Philadelphia District

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
1171 South Cameron Street, Room 103
Harrisburg, PA 17104-2501
(717) 783-5421, Ext. 636

September 12, 1989

Mr. Rusbeiro Messa
7052 Rutland Street
Philadelphia, PA 19149

Dear Mr. Messa:

This is in response to your request for a certified copy of an Injury Report indicating a date of injury of March 28, 1986.

A search of our files indicates no record of a report ever being submitted with this date of injury.

Very truly yours,

Frederick J. Woodward, Chief
Records Management Division

FJW/mh

AFFIDAVIT

I, Larry Glass, Esquire, being duly sworn and competent to testify to the matters herein stated, depose and say of my own personal knowledge, the following:

I am an attorney with office located at 1420 Walnut Street in Philadelphia, Pennsylvania.

On or about February 1987, Mr. Rusbeiro Messa consulted me to represent him on a workers' compensation claim.

On the first days of March 1987, I spoke by telephone with attorney Marcie Stander, counsel for Mr. Messa's employer and its insurance carrier, when we agreed on an extension of time to answer a petition

for termination of compensation and for the pretrial hearing, while I reviewed Mr. Messa's records.

On March 13, 1986, I had to call Mr. Messa by phone, to appear for a hearing on the State Building, since It was found that no Notice of Hearing was mailed to him.

On that date I explained to Referee Stander about the extension of time agreed with defendants' counsel, and also, that Mr. Messa had answered the petition for termination pro se, writing my name as appearance of counsel, without my consent.

The pretrial hearing was continued for three weeks, by agreement of Referee Stander and the parties, to exchange medical evidence and for Mr. Messa to retain or to look for an attorney.

On that date, March 13, 1987, no evidentiary hearing, no argument, no medical evidence was presented by the parties.

Thereafter, Mr. Messa's files were transferred to attorney Louis Kattleman, who I believe, filed appearance on April 1987. - Larry Glass, Esq.

ROSNER & ASSOCIATES

Attorneys At Law

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Philadelphia, PA 19102

(215) 732-9996

Daniel E. Rosner*

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New Jersey Office:

304 Longstone Drive

Cherry Hill, NJ 08003

(609) 751-0859

*Member of PA and NJ Bar Assn.

**Member of PA Bar Assn.

March 3, 1987

Marcie Stander, Esquire

1800 JFK Boulevard

19th Floor

Philadelphia, PA 19103

Re: Rusbeiro Messa vs. Frankford Quaker Grocery Co.

Termination Petition Number: 172-48-1387

Dear Ms. Stander:

Kindly allow this letter to confirm my telephone conversation with you on February 26, 1987, in which I advised that Mr. Messa had contacted my office to represent him in the above matter.

You kindly agreed to allow us 30 days in which to investigate this matter and determine whether we will represent Mr. Messa in the case, and answer the Termination Petition.

I understand that a pre-trial conference may be scheduled during this time, in which event we will make appropriate arrangements.

Thank you for your courtesy in this case.

Very truly yours,

LARRY GLASS

LG:ff

March 15, 1988

Subject: Rusbeiro Messa vs.
Frankford Groceries
SS # 172-48-1387

To: LaDonna M. Shirk, Chief
Administrative Division

From: Thomas S. Cook, Director
Bureau of Workers' Compensation

I have received a telephone call from Referee Stevenson on March 7, 1988. He has heard some very serious allegations about the above case. Apparently, Referee Stander is/was the Referee. A supersedeas request was denied three times. Referee Stevenson was quoting the allegation that the supersedeas was denied because Marcie Stander was representing one of the parties. Ms. Stander is the niece of Referee Stander.

I wonder about this in view of the fact that, to my knowledge, Ms. Stander usually represents defendants. At any rate, we should pull the file and examine it with a view towards investigating any possible improprieties.

Thank you for your kind attention to this matter.

March 31, 1988

Rusbeiro Messa vs. Frankford Groceries

SS # 172-48-1387

Referee Joseph Hakun, District Referee

Philadelphia Office

Thomas S. Cook, Director

Bureau of Workers' Compensation

This memorandum will summarize our brief conversation held on March 22, 1988. We have agreed to hold an informal conference about the parties. In view of the allegations raised about the impartiality of Referee Stander, I believe it imperative to closely examine all of the facts surrounding this case to see if a reasoned decision cannot be reached.

I am concerned about the appearance of impropriety that has been raised. I am not clear whether or not the matter was brought up by Mr. Messa or his attorney.

Our thanks to Referee Stevenson for bringing this matter to the Bureau's attention.

TSC/jmn

cc: Referee Wallace Stevenson

LaDonna M. Shirk

Subject: Rusbeiro Messa vs. Frankford Groceries
SS# 172-48-1387

To: Thomas S. Cook, Director

From: Joseph Hakun, Referee in Charge

Updating the above: After further hearing on May 23, 1988, Referee Stevenson decided to grant claimant's request for reconsideration of the supersedeas which had been previously entered by Referee Stander, and issued an interlocutory Order denying Supersedeas.

cc: Referee Stevenson

November 19, 1987

Referee Irvin Stander, Esquire
1500 State Office Building
1400 Spring garden Street
Philadelphia, PA 19130

RE: Rusbeiro Messa vs. Frankford Quaker Grocery

Reconsideration Termination Petition

No. 172481387

Dear Referee Stander:

Respectfully I send you this petition for a reconsideration of the supersedeas granted to defendants Northbrook Ins. Co. and Frankford Quaker Grocery as of May 5, 1987.

On July 10, 1987 due to severe pain I had to pay by my own, all hospital, surgery and medical treatment. Although several doctors from Northbrook Ins. Co., recommended that I was able to perform a job, including lifting, the post-operation diagnosis was right Ing.. hernia, left nerves entrapment, left hydroceles and bilateral epididymitis.

Forgive me, Referee Stander, for begging special attention to my case but some doctors advised me strict treatment or operation of the epididymitis, however, Insurance Co. refuses to pay and I ran out of

my savings and credit cards. I have stopped acupuncture treatment recommended by my urologist, despite some improvement, for economic reasons.

Referee Stander, I am a father of two who have tried to survive the last six months with utility bills to be cut off and many more problems. Please give me back, as a worker of the State of Penna., the right of having workers' compensation.

Thanks in advance for the attention given to the present.

Sincerely,

Rusbeiro Messa

Fleming
COMPANIES, Inc.

Egypt & Greentree Rds.
Box 935
Oaks, PA 19456
215/935-5000

I, Alan Elberson, am employed by Fleming Companies, Inc., as a Safety and Training Manager. My duties include the management of Fleming's Workmen's Compensation files. Fleming purchased Frankford Quaker Grocery in mid 1986 and I obtained custody of Rusbeiro Messa's workmen's compensation file in March 1989. With regard to the claims brought by Mr. Messa, Frankford Quaker has a contract with Northbrook Insurance Company whereby Frankford Quaker would take an initial report of injury from the employee and send it to Northbrook. Northbrook then processed the claim from that point forward. To the best of my knowledge, Frankford Quaker has not taken any improper steps to impeded or obstruct Mr. Messa's workmen's compensation claim.

Alan Elberson

Safety and Training Manager

Fleming Companies, Inc.

SWORNED TO AND SUBSCRIBED BEFORE ME THIS 7th DAY OF July, 1989.

Deborah A. Bell

Notary Public

ORDER

The Decision of the Referee is affirmed in part, vacated and remanded in part and reversed in part.

The Decision of the Referee regarding the Petition for Termination of Benefits filed by Defendant is affirmed.

The Claim Petition filed by Claimant is affirmed in part and vacated and remanded in part. The case is remanded for the limited purpose of allowing the Referee to establish a finding of fact to characterize the March 28, 1986 injury as a "new injury" or as a "recurrence".

The Referee is not permitted to reopen the evidentiary record. The Decision of the Referee to dismiss the Petition to Set Aside Final Receipt is affirmed. The Appeal Claimant is dismissed.

The Decision of the Referee with regard to the Penalty Petition for failure to issue Notice of Compensation Payable is vacated and remanded in part. The Petition is remanded for the sole purpose of allowing the Referee to develop a Finding of fact which addresses the assessment for twenty percent (20%) penalties based on unreasonable delay.

The Decision of the Referee to grant a Penalty Petition for failure of Defendant to pay medical expenses is vacated and remanded for the limited purpose of establishing a Finding of Fact that addresses the assessment of penalties in the amount of twenty percent (20%); that establishes a time period to which penalties should be applied; and that establishes an itemization and determination of the reasonableness of each individual medical expense filed by Claimant,

particularly those costs associated with Claimant's trip to Mexico.

The Decision of the Referee regarding an assessment of counsel fees to Defendant based on an unreasonable contest as filed under Section 440 of the Act is vacated and reversed.

BY THE BOARD

_____

CONCURRED IN BY

_____

_____

_____

Nov. 20, 1991

Commonwealth of Pennsylvania

DATE: February 24, 1992

SUBJECT: Rusbeiro Messa vs. Frankford Quaker Grocery
A91-102/No. 2718 C.D. 1991

TO: C. R. Hostutler, Chief Clerk
and Deputy Prothonotary
Commonwealth Court of Pennsylvania

FROM: David S. Hawkins, Assistant Secretary
Workmen's Compensation Appeal Board
PER: Donna McQuiggan

Attached is a certified copy of the Board's Opinion on the above-captioned case. Please note that Commissioner Urling affirmed in part; vacated and remanded in part and reversed in part this record to the Referee for further disposition.

Due to the fact that this appeal was remanded, do you need this record for Court? If not, please send a copy of

the Order quashing or dismissing the Petition for Review so my records can be closed.

If you have any questions, please do not hesitate to contact me.

Thank you for your attention to this matter.

attachment

In The Commonwealth Court of Pennsylvania

RUSBEIRO MESSA

: Petitioner

:

v. :

WORKMEN'S COMPENSATION APPEAL : BOARD (FRANKFORD QUAKER CO. : et al.)

Respondents :

No. 2718 C.D. 1991

ORDER

NOW, February 26, 1992, upon consideration of the above petition for review, and it appearing that the order being appealed remands the case

to a referee, and it further appearing that said order is a nonappealable, interlocutory order, the above petition for review is dismissed. *See FMC Corp. v. WCAB (Wadatz)*, 116 Pa. Commonwealth Ct. 527, 542 A. 2d 616 (1988); *Murhon v. Workmen's Compensation Appeal Board*, 51 Pa. Commonwealth Ct. 214, 414 A. 2d 161 (1980).

BY THE COURT:

_____

S.J.

Feb. 27, 1992

Workmen's Compensation Appeal Board

Rusbeiro Messa, Claimant	Petition for Supersedeas
4161 Salem Street	
Philadelphia, PA 19124	filed by Appellant.
vs.	S.S.# 172-48-1387
Frankford Quaker Grocery, Defendant	
"I" St & Erie Avenue	DENIED

Philadelphia, PA 19124

Northbrook Insurance Company

P.O. Box 548 Insurance Carrier

King of Prussia, Pa 19406

James J. Muller, Esquire Claimant's Counsel

2401 Pennsylvania Avenue

Suite 1C-44

Philadelphia, PA 19130

Susan C. Ells, Esquire Defendant' Counsel

1800 JFK Boulevard

19th Floor

Philadelphia, PA 19130

ORDER

AND NOW, to wit, this 30th day of December, 1992, upon consideration of Appellant's Petition for Supersedeas is hereby denied as to Claimant's compensation, but granted as to costs and medical expenses. Statutory interest is to be paid on past-due compensation.

BY THE BOARD:

Dec 30, 1992

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF LABOR AND INDUSTRY

BUREAU OF WORKERS' COMPENSATION

3607 DERRY STREET

HARRISBURG, PA 17111

(215) 560-2488

ASSIGNMENT OF PETITION TO WORKERS' COMPENSATION REFEREE

SS # 172-48-1387

FEBRUARY 12, 1987

TERMINATION DATE OF THIS NOTICE

PHILDELPHIA COUNTY

Rusbeiro Messa
7052 Rutland St.
Phila., PA 19149

vs.

Frankford Quaker
Grocery Co.
"I" & Erie Ave.
Phila., PA 19124
Northbrook Insur. Co.
P.O. Box 548
King of Prussia,PA
19406

Kenneth F. DeMarco, Esq
1800 JFK Blvd.,19th Fl
Phila., PA 19103

COPY OF PETITION
MAILED TO
ADVERSE PARTY
WITH THIS NOTICE

The Referee will notify all parties of the time and place of the hearing. The parties are hereby notified that an answer filed with the Referee at his office within fifteen (15) days from the date of this notice. Facts alleged in a claim petition will be deemed to be admitted unless specifically denied. However, the failure of any party to deny a fact alleged in any

other petition shall not prelude the Referee from requiring proof of such fact at a hearing. If a party fails to appear in person by counsel at a scheduled hearing without adequate excuse, the Referee shall decide the matter on the basis of the petition and the evidence presented.

THE ABOVE PETITION HAS BEEN ASSIGNED TO THE FOLLOWING REFEREE FOR DETERMINATION:

Peter E. Perry, Jr., Dist. Mgr.

1523 State Office Building

1400 Spring Garden Street

Phildelphia, PA 19130

kmw

RESPONSE TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

HISTORY OF CASE

To have a clear idea of the defendants' joint continuous malice and manipulation of statues to deprive plaintiff of his state and federal constitutional rights, a lengthier background is necessary.

On June 1977 plaintiff is hired by Frankford as a warehouseman pulling and pushing six feet high loaded carts and picking up merchandise up to 72 lb., and plaintiff being the only Spanish hired by Frankford, which was located in a near Spanish neighborhood.

On December 2, 1982, plaintiff sustained his first testicular injury on the job, receiving workmen's compensation during two months until he returned to work. This injury aggravated on his job on August 1984, diagnosed by Frankford's physician as AIDS, but on second opinion from plaintiff's urologist, as epididymitis and varicocele. Frankford denied

compensation, plaintiff had to return to heavy lifting work, suffering additional injuries on the job, as mentioned below. Referee Stevenson ordered benefits on December 1985.

On November 1984, unable to climb to reach merchandise, plaintiff sustained an injury on right thumb; same Frankford's physician injects cortisone on plaintiff's thumb and released him to regular work. Days later, plaintiff is laid off by Frankford. On March 1985, plaintiff has a thumb ligament surgery, and Frankford requests him to sign a Final Receipt of compensation in order to return to work on August 5, 1985.

On December 27, 1985, plaintiff aggravated testicular injury, and also sustained a low back strain and a left inguinal hernia, as diagnosed by Frankford's physician, however, plaintiff was released to "full work" on January 6, 10 and 13, 1986.

On January 20, 1986 plaintiff was submitted to a hernia surgery performed by surgeon

contracted by Northbrook and Frankford, where the plaintiff sustained further abdominal-groin injuries.[1]

On or about January 14, 1986, Northbrook's adjuster, Jean Valentino, issued a Notice of Compensation Payable (NCP) for the injuries sustained on December 27, 1985, but three days after plaintiff's hernia surgery, Ms. Valentino terminated the NCP or agreement, persuading Messa, who was sedated by the effect of Demerol, to sign a Final Receipt of Compensation for injuries of 1985, promising that the benefits would continue. In effect, benefits continued at he same rate, $336.00 per week based on plaintiff's average salary of $526, but under another NCP issued on January 27, 1986.

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[1]After hernia surgery performed at the industrial clinic of Frankford, plaintiff complained of severe pain unable to move left leg to stand and walk; the clinic denied diagnostic tests and stay in the clinic because as explained by surgeon, as a short procedure Northbrook would not pay for overnight stay. Instead, narcotics were provided to take home. On exploratory surgery July 10, 1987, it was found nerve entrapment and nerve damage. A malpractice action is on appeal on the Superior Court of Pennsylvania. Messa v. Thonet, May Term 1988, No. 5164, appeal Sup. Ct. No. 00469 (1992)

Plaintiff was advised by Frankford and Northbrook that he would loose his job if he did not return to work on March 20 and 28, 1986. He was unable to lift on March 20, then returned home.

On March 28, 1986, light duty was denied by Frankford, plaintiff reported to his supervisor that he suffered a left and right abdominal-testicular pain falling and banging right knee against floor with a 72 lb. box. Frankford's physician examined and released plaintiff to "full work" and after second opinion a tear meniscus was removed by surgery on June 19, 1986. Plaintiff has been disabled since this injury.

On or about May 1986, Northbrook hired Mary Rapp as a rehabilitation nurse to make home visits to persuade plaintiff that his knee surgeon was not as competent as the one provided by Northbrook; also to follow Messa to his doctor's appointments demanding to see the examination and doctor's cooperation otherwise she would report to Northbrook not to pay for treatment. Thereafter, physician demanded advance payment from plaintiff for each consultation, because adjusters from

Northbrook, Scott Mattis and Schmid had stated that the knee injury not as workmen's compensation injury, that plaintiff had Blue Cross benefits.

The nurse and Mr. Mattis also arranged plaintiff's examination by a urologist who changed his attitude after request for cooperation from Mr. Mattis. A surgeon referred by the urologist stated that plaintiff could have nerve damage during hernia surgery. Northbrook paid the urologist examination, but denied the surgeon's.

On November 11, 1986, the nurse and Northbrook arranged plaintiff's examination by three doctors supposed to be Dr. Spitz, Dr. Bennet and Dr. Wineski, to find relief for plaintiff's urological and orthopedic symptoms.

On February 3, 1987, Frankford and Northbrook filed with the department a Petition for Termination of Compensation for injuries sustained on December 27, 1985, which already had been terminated by a Final Receipt issued on January 14, 1986, Defendants invoked Section 413 of the Act, alleging that

"all disabilities referable to the aforementioned injury has ceased and terminated", based on "foregoing allegations". No evidence or forgoing allegations were attached to the petition.

On or about February 26, 1987, plaintiff not satisfied with his first attorney, consulted with attorney Larry glass, who advised Messa not to answer petition for termination since he had agreed on extension of time with defendants' counsel. However, plaintiff timely filed and answer to avoid risk of uncontested termination petition.

On March 13, 1987, at about 12 noon, counsel Glass called the plaintiff by phone informing that his presence was needed at the State Office Building within 30 minutes. On his way, plaintiff was followed from his home by a lady, usually assumed to be a nurse. In the hearing room, Referee Irvin Stander advised plaintiff that his compensation benefits were going to be terminated. Plaintiff replied he had no notice of hearing. Plaintiff's counsel stated he had not decided to represent him. All parties agreed to postpone hearing to present

evidence and arguments. One lady, identified months later a Marcia Stander, and attorney David Yockey were representing Frankford and Northbrook. After this meeting, plaintiff's counsel very frustrated advised him to look for other attorney as soon as possible.

On or about April 1987, plaintiff hired the third attorney, Louis Kattleman, referred by Lawyers Referral Service, who after plaintiff received by mail on May 23, 1987 the Order of Referee Stander suspending compensation benefits, advised the plaintiff that nothing could be done, Referee's Order was unappealable. Plaintiff sees for the first time the evidence in support of termination petition, no affidavits but letters from one physician to the other, and to the nurse, stating that plaintiff suffered hernia and epididymitis on December 27, 1985 and that he needed a nerve blockage; also that a knee injury was suffered on 3-28-86 and plaintiff had some restrictions and needed further therapy, clearly indicating plaintiff was not fully recovered.

On July 10, 1987, inguinal and testicular exploratory surgery was recommended by several

physicians, but Northbrook and Frankford refused to pay for surgery based on supersedeas Order of Referee Stander; plaintiff had to sell personal belongings and borrow money from friends to pay for surgery. It was discovered nerve entrapment and nerve damage on the inguinal hernia and bilateral hydrocele and epididymitis.

Since the knee surgeon demanded payment for treatment in advance and plaintiff had no income at all, plaintiff had to change doctors and be submitted to two more knee surgeries on 1988, and again look for more doctors when these were denied payment for treatment. In the meantime plaintiff was provided with and addicted to narcotics and antidepressants.

On June 1987 plaintiff hired the fourth attorney M. Radbill, who assured prompt reinstatement of benefits based on surgery of July 10, and on the knee injury.

On August 28, 1987, plaintiff had his first evidentiary hearing before Referee Stander. Before hearing, a fire alarm test was performed in the State

Building, where two ladies (assumed to be Northbrook's nurses, but one of them identified months later as counsel Marcia Stander) impeded Messa the use of the elevators despite having using a cane. Plaintiff had to step down 15 floors under the surveillance of these two ladies on the 13 and again I believe 2 floor. Plaintiff also had to use Demerol to be able to testify. He testified that he recently had a bilateral inguinal surgery and still unable to work. Also that he had sustained a knee injury on 1986 and still disabled. Plaintiff is persistently questioned by defendants' attorney and by Referee Stander if he had been told he may have a lawsuit against somebody else besides the employer.

Compensation benefits continued suspended after the testimony, then plaintiff sent Referee Stander a letter requesting re-instatement of benefits to get proper medical treatment and to support two children. Referee stated that no medical evidence had been filed by plaintiff's attorney and issued a second Order granting supersedeas on December 4, 1987. On November 1987 plaintiff dismissed his attorney who

declined to release the records to another attorney, demanding a thousand dollars. Consequently, plaintiff had to represent pro se on second hearing before Referee Stander on December 18, 1987, when referee declined to accept plaintiff's medical evidence, advising him to send it by mail and also, promising reconsideration of supersedeas Order, stopped plaintiff's argument of violation of the Act by the defendants. Instead, referee issued a third Order on January 13, 1988, ranting supersedeas.

By referee's subpoena of all medical records, requested by the defendants on October 1987 it was discovered that defendants' physician Dr. Bennet's records indicated he never examined plaintiff Messa, despite his report dated November 10, 1986.

Plaintiff also discovered by his records released on January 1988 by his counsel, a conflict of interest or family bias in the referee's Order, which was covered up by removing the name of Marcia Stander from the list of lawyers representing Frankford sand Northbrook. The law firm admitted this relation.

Plaintiff also discovered that any of his previous four counsel had filed with the department a new Claim Petition for the injuries sustained on 3-28-86, which plaintiff filed on January 22, 1988, and this new claim was assigned to Referee Wallace Stevenson, because Referee Stander was seriously ill.

Northbrook and Frankford answered the new claim petition denying knowledge of injuries and denying any payment for medical treatment related to those injuries. Frankford's personnel director denied a copy of the injury report of March 28, 1986 found by plaintiff in the employer's records, because of "company's policy". Plaintiff presented a Referee's subpoena which Frankford failed to comply with on hearing of March 2, 1988 and requested pursuant to Pa R.C.P. Rule 4009.

With the help from friends and relatives and a Legal Help membership, plaintiff researched and educated himself in workmen's compensation law and March 2, 1988, before Referee Stevenson, he argued pro se, the defendant's violation of the Act and not having a

pre-termination hearing to rebut supersedeas. Referee stated that the plaintiff did not have a pre-termination hearing but he had the chance to present medical evidence by mail.[2]

By this time Messa had received two notices of mortgage forclosure; he had loss his 1986 model car and had borrowed money at high interest rates, and was receiving Public Assistance; he also was recommended psychological treatment.

By Order circulated on June 27, 1988, Referee Stevenson reinstated plaintiff's compensation benefits, while plaintiff represented by attorney James Muller, from Steiner, Segal and Muller. The referee ordered reimbursement of disability benefits retroactive from May 1987 to January 1988 continued to be withheld based on that Order. It was also ordered attorney's fees deducted from plaintiff's award.

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[2]It was on or about Dec. 1990 that thre plaintiff discovered that under the Pennsylvanisa Workmen's Compensation Act and also under the case Baksalary v. Smith 579 F. Supp 218 (1984), State and federal law required for the plaintiff not only an opportunity to present evidence but an opportunity to be heard.

Despite referee's Order reinstating full benefits, Northbrook and Frankford continued denying payment for medical treatment based on the supersedeas Order, as complained by hospitals and doctors and as investigated by the Department of Labor.[3]

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[3] Messa informed in writing to his attorney and to all parties about his intentions to file lawsuit to claim compensation benefits and tort, if violations of the Act continued. On December 1988 he filed pro se a complaint in the Common Please Court of Philadelphia against Frankford and Northbrook (Northbrook's Mot. to Dsmss.Amdd Cmpt., Exhibit "L"). The Court denied defendants' preliminary obkections based on the defendants' pleading that a lawsuit is barred against the employer, and not barred against Northbrook for tort as in Kuney v. PMA Ins. Co. 550 A 2d. 1009 (Pa. SUperior Ct. 1988) (Exhibit). Messa filed a Motion for Summary Judgment and the defendants untimely filed and answer. The Court, instead of ruling on the plaintiff's motion, reversed the decision on the preliminary objections dismissing the complaint. On its opinion filed with the Superior Court, the trial court admitted that the Order dismissinf the complaint was an error of the court, that the "Kuney's" ruling still controlling. However, this "Kuney's" ruling was reversed by the Supreme Court of Pennsylvania right after Messa's oral argument in the Superior Court, barring lawsuits against insurance carriers, even in cases where it is alleged that carriers have deprived claimant's benefits by fraud and deceit. (Kuney v. PMA Ins. Co., 578 A 2d. 1285 (Pa.S.Ct. 1990).
Messa filed a petition for reargument, a petition for allowance of appeal and a reconsideration in the Supreme Court of Pennsylvania, based on the deprivation of due

The Department also certified that Frankford did not file plaintiff's report of injury of 1986.

Counsel Muller declined plaintiff's request to file a petition to Set Aside Receipt and to correct Notices of Compensation Payable (NCP) for the injuries of 1985, based on fraud and incorrect information that would affect his compensation benefits for low back and testicular injuries. Plaintiff filed petition pro-se, counsel Muller proposed Referee Stevenson to withdraw petition; plaintiff filed appeal to the Workers' Compensation Board (the Board), The Board, after plaintiff's oral argument agreed to set aside Final Receipt of compensation with the condition that it would be reversed if plaintiff would intent to bring lawsuit against somebody. On or about September 21989 the Board vacated and remanded the referee's Order to withdraw the petition to set aside Final Receipt...

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3 (...continued)
process of law guaranteed by the Constitution of the United States, and also based on the Consent Decree of this court in 1984, finding section 413 of the Act

On or about September 28, 1990, plaintiff sent by mail to his counsel and all parties a list of medical bills denied by Northbrook and paid by plaintiff for a total of $11,69.00.

On November 1990 counsel Muller informed plaintiff that he had filed with the referee a proposed Order: claiming medical bills for $6,660.00; to dismiss plaintiff's petition to set aside final receipt and the petition to correct or review Notices of Compensation Payable; to suspend total compensation for injuries of 1986 while permanent injuries of 1985 were paid; it was also proposed to dent Termination Petition; to impose penalties for violation of the Act denying medical benefits and not accepting injuries of 1986 under a Notice of Compensation Payable; to impose attorney's fees.

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3 (...continued)
unconstitutional, but all petitions were denied by the State Courts.
On Dec. 2, 1991, Messa filed a petition for a writ of certiorari with the Clerk of the Supreme Court of the United States. Only Northbrook filed Brief in response to perion for certiorari. untimed on Jan. 26, 1992, without certification of service, and not denying

On letter to the Referee, November 25, 1990, plaintiff partially objected to the proposed Order on grounds that the record should be corrected before a Final Order, and that part of the Order was not in compliance with the Act and not in the best interest of Plaintiff and not with the consent of plaintiff.

On Order circulated on December 19, 1990, Referee Stevenson accepted the proposed Order as a Final Order. Plaintiff and the Defendants appealed to the Workers' Compensation Appeal Board. The Board first issued an Order dismissing the termination petition and ordering the attorney's fees to be deducted from plaintiff's award. Days later the Board issued another Order with an Opinion on November 20, 1991, vacating and reversing the attorney's fees award, dismissing

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3 (...continued)
deprivation of due process constitutional issues in the State Courts. The Supreme Court denied petition for certiorari. Days later, Messa found on the Court's records an affidavit of service from a print shop employee, stating that Northbrook's Brief was served on Messa on Jan. 22, 1992. That affidavit was never mailed to Messa by defendant's counsel, Mr. Venuti.

petition to set aside final receipt and to correct Notices of Compensation Payable; vacating and remanding penalties award.

Plaintiff's counsel declined to appeal the final Orders reversing attorney's fees and dismissing petition to set aside final receipt and to correct the NCP. Plaintiff, pro-se, files an appeal petition for review with the Commonwealth Court of Pennsylvania, requesting evidentiary hearing pursuant to Pa R.A.P. Rule 1513(d). The defendants did not file Brief in opposition and did not transfer the department's records to the appeal court. On February 27, 1992, the Court denied petition for review because "it appearing that the Order being appealed remands the case to the Referee, and it further appearing that said order is a non appealable interlocutory order..." After this Order, Northbrook and Frankford filed a Brief.

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF LABOR AND INDUSTRY

BUREAU OFWORKERS' COMPENSATION

3607 DERRY STREET

HARRISBURG, PA 17111

NOTICE OF COMPENSATION PAYABLE

SS# 172-48-1387 Date of Notice: 1-27-86

Employer/Insurer Claim Number -W1H37701430l8WC

Notice is tobe sent to injured employee with the first payment of compensation and a copy filed with the Department of Labor and Industry.

Injured Employee: Rusbeiro Messa

Address: 7052 Rutland Street, Phila., PA 19149

Employer: Frankford Quacker Grocery Co.

Address: I & Erie Ave., Phila., PA 19124

Nature of Injury: left inguinal hernia

Check if injury is: (1) Permanent loss under 306(C)

(2) Eye injury

(3) Radiation injury

Compensation payable as follows:

1. Weekly disability rate $ 336

Check applicable: |X| Maximum allowable

|__| Below maximum based on

average weekly wage of $_____*

*A completed wage statement in accordance with Section 309 must be attached to this Notice if rate below maximum.

2. Payments begin on 1-14-86 for injury which occurred on 12-9-85 (Compensation is not payable for first 7 dsys of disability unless disability exceeds 13 days.)

3. Payments will hereafter be made: |__| weekly

|X| Biweekly |__| Other (Specify)_____

until employee returns to work without lose of income or disabiitu otherwise ceases or changes in effect: HOWEVER, any termination or modification of these payments must be by agreement or final receipt, order of Departmental referee or Workmen's Compensation Board, or as otherwise provided in rule and regulations

of the Departmenr, or as limited under Section 306(C) for amputation or other specific losss thereunder.

4. If injury involves loss under Section 306(C) and employee has returned to work, complete the following information:

(a) Compensation is payable _____ weeks for loss of _____

(b) Employee returned to work without loss of income on _____

(c) Healing period payable for _____ weeks (Up to (b) above and subject to 7-day waiting period)

(d) Total (a) and (c), payable _____weeks

5. Remarks:_____

_____

Notice to Employee: If any questions arise involving these payments, contact representative named at bottom of this Notice. If you cannot resolve any problem with employer representative, you may call the Bureau toll free at 800-482-2383.

(TYPE ONLY):

Employer/Insurer: Northbrook Nat'l 279

Representative: Jeum M. Valentino

Phone Number: 215-337-4500

OIDC 495(2.75) WC 1563b (Fd 2.75)